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7 **Defendant in Proper Person**

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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 Securities and Exchange Commission, }
13 }
14 Plaintiff }
15 }

16 vs. }

17 Exotics.Com, Inc., L. Rex Andersen, }
18 Marlin R. Brinsky, Daniel G. Chapman, }
19 Stephen P. Corso, Jr., Barry F. Duggan, }
20 Firoz Jinnah, Ingo W. Mueller, }
21 Brian K. Rabinovitz, Edward James Wexler, }
22 Gary Thomas a/k/a Gary Thomas Vojtesak }
23 Defendants }

24 and }

25 Flanagan & Associates, LTD., }
26 }
27 Relief Defendant }

CV-S-05-0531-PMP-GWF

28 **MOTION TO COMPEL RESPONSES TO DISCOVERY**
29 **REQUESTS**
30 **(ORAL ARGUMENT REQUESTED)**

31 **CERTIFICATION STATEMENT**

32 Daniel G. Chapman, a Defendant in the above-entitled action, hereby certifies that this
33 Motion is timely filed. Mr. Chapman also certifies that he has discussed this matter with
34 Plaintiff, as required by Rule 37 of the Federal Rules of Civil Procedure and Local Rule 26-7,
35 as detailed more fully in the Affidavit of Daniel G. Chapman, attached as Exhibit 9.

1 MOTION AND NOTICE OF MOTION

2 Movant hereby asks this Court, pursuant to Rule 37 of the Federal Rules of Civil
3 Procedure (“FRCP”), to order Plaintiff to respond to Mr. Chapman’s discovery requests, as
4 required by FRCP Rules 26, 33, and 34.

5 This Motion is based upon the papers and pleadings on file in this action, the Points and
6 Authorities submitted herewith, and such oral argument as the Court will entertain at the
7 hearing on this matter.

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9 Dated August 18, 2009.

10 Respectfully submitted

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13 Daniel G. Chapman
14 Defendant Pro Se

15 **Memorandum of Points and Authorities**

16 **I. Statement Of Facts**

17 The Securities and Exchange Commission (the “SEC”) brought this action against
18 Movants and others by filing a Complaint on April 25, 2005. The formal investigation was
19 initiated on January 15, 2002 by the issuance of a Formal Order of Investigation.

20 Movants are alleged to have violated or to have aided and abetted others who violated
21 §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) and SEC Rule 10b-5 (17
22 C.F.R. §240.10b-5) promulgated thereunder.

23 On October 16, 2008, Mr. Chapman propounded to the SEC a First Set of Requests for
24 Admission, a First Set of Interrogatories, and a First Set of Requests for Production of
25 Documents (collectively, the “Discovery Requests”). Copies of these Discovery Requests are
26 attached as Exhibits 1, 2 and 3 respectively.

1 On November 17, 2008 the SEC responded to these Discovery Requests. Copies of
2 these responses are attached as Exhibits 4, 5 and 6 respectively.

3 Requests for Admissions

4 ? The 14 Requests for Admissions each dealt with a particular paragraph or
5 group of paragraphs in the Complaint. In responding to these Requests, the SEC
6 raised two general objections. First, they objected “to the extent that they [the
7 Requests for Admissions and the Definitions contained therein] are not limited to
8 any time period.” (Exhibit 4, page 2, paragraph 2.) Their second objection relates
9 to “the extent that the Commission lacks information or knowledge necessary to
10 respond to the requests prior to conducting additional discovery.” (Id. at
11 paragraph 3.)

12 Interrogatories

13 ? The SEC objected generally to the Interrogatories on the basis that “they
14 are not limited to any time period.” (Exhibit 5, page 2, paragraph 4.) In addition,
15 they objected “to the extent that they call for information protected by attorney-
16 client privilege, work-product immunity, law enforcement privilege, deliberative
17 privilege, or any other privilege or immunity.” (Id. at paragraph 2.) Finally, they
18 objected to the request to identify documents that may support the contentions in
19 the Complaint as being “unduly burdensome, unreasonable and intended to harass
20 ...” (Exhibit 5, page 3, paragraph 8.)

21 ? Interrogatory No. 5 asked the SEC to identify evidence which supports
22 their allegations in paragraph 113 of the Complaint. In responding to this
23 Interrogatory, the SEC referenced the Ninth Circuit’s opinion in the Criminal
24 Case, *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) (the “Criminal
25 Case”) as evidence of Mr. Chapman’s practice of creating and merging shell
26 corporations.
27

1 ? Interrogatory No. 7 asked the SEC to identify all communications with
2 other governmental agencies, including, but not limited to, the Department of
3 Justice and the Office of the United States Attorney for the District of Nevada,
4 concerning Mr. Chapman. The SEC objected and refused to answer, claiming that
5 the Interrogatory called for matters falling within some unidentified privilege,
6 including, possibly, one of the privileges mentioned in the general objections.

7 ? Interrogatory No. 8 asked the SEC to identify all communications with
8 other individuals or entities concerning Mr. Chapman. Again the SEC refused to
9 answer, citing some unidentified privilege, including, possibly, one of the
10 privileges mentioned in the general objections.

11 ? Interrogatory No. 16 asked the SEC to identify all evidence regarding their
12 allegation in the Complaint that shares of Exotics-Nevada needed to be registered
13 prior to being re-issued and distributed. The SEC's response was that it intends to
14 rely on Section 5 of the Securities Act.

15 ? Interrogatory No. 17 read "[f]or each REQUEST FOR ADMISSION for
16 which your response is anything other than an unqualified admission, please
17 IDENTIFY all EVIDENCE upon which YOU intend to rely at trial to support
18 YOUR response." There were 9 such responses to the Requests for Admission.
19 The SEC objected to this Interrogatory, claiming that it is "an impermissible
20 attempt to expand the number of allowed interrogatories beyond the number
21 allowed by Fed. R. Civ. P. 33, and therefore declines to answer at this time."

22 Requests for Production of Documents

23 ? The SEC made similar general objections, citing the same privileges
24 claimed in the responses to the Interrogatories. They also state that "[t]he
25 Commission's response that it will produce the documents sought by a particular
26 request does not constitute an admission that it actually possesses the documents
27 requested or that any such document exists."

1 to, credit card statements, telephone records, and bank statements. These
2 documents were then provided to Mr. Chapman and the other defendants in the
3 Criminal Case by the prosecutors (with Mr. Chapman's personal identification
4 data – address, social security number – available for all to see). Again, the
5 Privilege Log lists no communications between the SEC and the United States
6 Attorney's Office concerning the turnover of those documents.

7 3. After an earlier hearing on this matter, Mr. Fontes indicated to Mr. Chapman
8 and Mr. Flanagan that he had never met Greg Damm (the prosecutor in the
9 Criminal Case), but had spoken on the phone to him. Once again, the Privilege
10 Log lists no such communication.

11 4. On March 3, 2009, the SEC sent a CD-ROM to Mr. Chapman. The
12 accompanying letter from Rachel Hershfang of the SEC (a copy of which is
13 attached as Exhibit 8) stated that the information on the CD-ROM was "seized
14 by the Internal Revenue Service during the search of [Chapman & Flanagan's
15 law office]", "was provided to the SEC by the IRS during the criminal
16 investigation" and "[g]iven the conclusion of the [criminal] case, the IRS
17 recently gave us permission to provide a copy to you." The search was
18 conducted by Michael Payne, pursuant to a search warrant issued on April 3,
19 2003 in reliance on his affidavit. The Indictment in the Criminal Case was dated
20 August 7, 2003, indicating that the information was sent to the SEC during that
21 4 month period, 18 months before the Complaint was filed. The search warrant
22 specified that documents from seven companies were to be seized, but contained
23 no reference to Exotics.com. Once again, no entry exists on the Privilege Log of
24 any communication from Mr. Payne, either when the material was originally
25 provided to the SEC or when the IRS gave the SEC permission to release it.

26 5. On July 27, Mr. Chapman served a subpoena on the United States Attorney for
27 the District of Nevada seeking certain information that was intentionally

1 withheld from Mr. Chapman during the Criminal Case, including, but not
2 limited to, the transcript from one of Michael Payne's three grand jury
3 appearances. (Payne was the only "expert" to testify before the grand jury.) Just
4 two days later, on July 29, the SEC sent an e-mail indicating that it intended to
5 revise its Initial Disclosure to include two new witnesses, Robert Potter and
6 Shawn Hackman. A few days after that, The SEC added two other new
7 witnesses, Peter Berney and Douglas Ansell. These are four convicted felons, all
8 of whom were used as government witnesses in the Criminal Case. That the
9 SEC identified these felons without input from or communication with the
10 United States Attorney's office defies belief. The absence of any such
11 communication on the Privilege Log is simply the most recent assault on
12 common sense.

13 Together with the total lack of evidence that Mr. Chapman knew or should have
14 known that any of the alleged violations of federal securities laws were taking place, the
15 allegation that the United States Attorney's Office is the driving force behind this case is and
16 will be a major part of Mr. Chapman's defense. The SEC has made the Criminal Case
17 relevant (e.g. their response to Interrogatory No. 5), and clearly intends to do so during trial.
18 The Discovery Requests simply attempt to identify the SEC's basis for claiming that Mr.
19 Chapman acted with scienter, and to discover evidence of other agencies influencing or
20 directing the SEC's actions in this matter. As such, the information that Mr. Chapman
21 requests is relevant and, thereby, discoverable.

22 **Number of Interrogatories**

23 The SEC, as discussed in the Statement of Facts, *supra*, refused to answer
24 Interrogatory 17, claiming that it was an impermissible attempt to avoid the limitation on the
25 number of allowed interrogatories. The SEC, however, provides no support for this
26 contention. Even if we accept that a global request, such as Interrogatory 17, should count as
27 more than one, given the SEC's responses to the Request for Admissions, Interrogatory 17

1 would only include 9 interrogatories. Therefore, only 25 interrogatories were included, even
2 under the SEC's method of counting. Mr. Chapman asks this court to require their response.

3 **SEC's Reliance on Privileges**

4 The SEC, as discussed above, lodged several general objections. With respect to
5 Interrogatories 7 and 8, the SEC asserted the Law Enforcement Privilege and the Deliberative
6 Privilege. Mr. Chapman contacted the SEC after receiving their responses, asking for
7 information about these privileges. On December 8, 2008, Mr. Chapman received a letter
8 from Rachel Hershfang referencing a well known treatise on evidence. This reference
9 described the Law Enforcement Privilege as applying to a Freedom of Information Act
10 request, and the Deliberative Privilege as dealing with internal agency policies. Neither of
11 these privileges apply here. Neither do the Attorney-Client or Work Product privilege, as
12 neither the IRS, the United States Attorney, nor any other entities described in Interrogatories
13 7 and 8 represented the SEC, were represented by them, or were retained by the SEC to
14 provide legal counsel to the SEC. Mr. Chapman asks that this court order the SEC to respond
15 fully to these Interrogatories and the corresponding Requests For Production of Documents.

16 **Other Objections**

17 The SEC made three other global objections which were discussed above in the
18 Statement of Facts. They argue that the Requests for Admissions and the Definitions
19 contained therein are not limited to any time period. This is a disingenuous objection. Each
20 Request for Admission referred to a particular paragraph of the Complaint. How is it
21 possible, then, that the SEC can be unaware of the time periods involved in their own
22 allegations?

23 Their second objection relates to "the extent that the Commission lacks information or
24 knowledge necessary to respond to the requests prior to conducting additional discovery."
25 This objection was lodged in the responses to the Requests for Admission, each of which
26 related to a specific paragraph of the Complaint.

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1 The final objection borders on the absurd. In responding to the Request for Production
2 of Documents, the SEC states “[t]he Commission’s response that it will produce the
3 documents sought by a particular request does not constitute an admission that it actually
4 possesses the documents requested or that any such document exists.” Apparently the SEC
5 believes it has the ability to deliver documents and simultaneously deny that those documents
6 actually exist.

7 FRCP 9(b) requires that a complaint alleging fraud requires pleading with specific
8 particularity. On August 19, 2008, prior to the SEC responding to the Discovery Requests,
9 Mr. Fontes argued in open court that the Complaint meets this heightened pleading
10 requirement. If the SEC really did meet this pleading requirement, they would not need to
11 make these objections; they should already have enough information at the time the
12 Complaint was filed; they should know the time periods involved in their allegations; they
13 should know whether they are relying on documents, and whether or not the documents they
14 are relying on actually exist; and they should not claim that the requests are burdensome. Not
15 only should they know this information, FRCP 9(b) requires them to know these things, and
16 to know them at the time they file the Complaint. Facts discovered after a complaint is filed
17 would simply solidify their case. But discovery is not simply a means by which a plaintiff
18 can discover facts to fulfill its initial obligations under FRCP 9(b). This objection indicates
19 that the SEC has not met their obligations under FRCP 9(b) and is simply conducting a
20 fishing expedition.

21 **III. Conclusion**

22 As the evidence indicates not only that the IRS and the United States Attorney’s
23 office has communicated with the SEC since prior to the commencement of this case, but that
24 the SEC intends to rely greatly upon the Criminal Case at trial, proper and complete
25 responses to the Discovery Requests is not only relevant to this case, but essential to Mr.
26 Chapman’s defense. The SEC’s objections are ill-founded and inapplicable, and are meant
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1 simply to harass Mr. Chapman and delay the completion of this case. Mr. Chapman asks this
2 Court, therefore, to order the SEC to respond to the Discovery Requests.

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8 Respectfully submitted,
9 Dated August 17, 2009.

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12 Daniel G. Chapman
13 Defendant Pro Se
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2009, I forwarded a true and correct copy of the foregoing MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS by filing and serving the same using the ECF system or by U.S. Mail as indicated:

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